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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JESUS ARREOLA, Defendant and Appellant.	D035044 (Super. Ct. No. SF132162)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed.

Jesus Arreola appeals from a judgment following conviction of two counts of attempted voluntary manslaughter, one count of mayhem, three counts of assault with a semi-automatic firearm, one count of dissuading a witness by force or threat and one count of discharge of a firearm from a motor vehicle. True findings were made on various firearm and infliction of great bodily injury allegations.

Arreloa was sentenced to a term of 35 years, 4 months to life. He appeals, arguing (1) the evidence is insufficient to sustain his conviction of intimidation/dissuading a witness and insufficient to sustain the verdict of attempted voluntary manslaughter as to victim Roger Harris, (2) the trial court erred in refusing to instruct the jury on the lesser offense of grossly negligent discharge of a firearm within the meaning of Penal Code[1] section 246.3 and (3) the trial court erred in denying appellant's motion for a new trial based upon counsel's failure to allow appellant to testify in his own behalf.

FACTS

A. *Prosecution Case*

On November 13, 1998, Rodolfo Betancourt was at work, managing a nightclub in Chula Vista. Danny Lopez was working at the club as a uniformed security officer. Betancourt first noticed appellant walking in and out of the club around 9:30 p.m. Sometime later, a customer complained to Betancourt that appellant was bothering him. Appellant approached Betancourt, pointed at the complaining customer and asked in Spanish "You want me to beat him?" Appellant then went outside and quickly requested readmission to the club; however, Betancourt, intending to diffuse the situation, refused. Appellant was seen walking to his pickup truck and returned a few minutes later holding a .45 caliber semi-automatic pistol.

Moments after returning, appellant pointed his gun at Betancourt's head and said in Spanish something like "So what? Can I come in?" Betancourt repeatedly indicated

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[1] All statutory references are to the Penal Code unless otherwise specified.

appellant could come in but that he should calm down and put the gun away. Appellant moved the gun toward his waistband but suddenly said "I told you so" and pointed the gun at Lopez. Appellant fired one shot, hitting Lopez in the head.

Roger Harris was approximately 10 feet away when he saw appellant pointing the pistol at Betancourt and Lopez. After the shooting, Harris checked Lopez and then followed appellant. When appellant reached his truck and began fiddling with his keys, Harris approached from the truck's rear and said something to the effect "Hey, you maybe should wait around a while." Appellant responded by pointing his weapon at Harris, stating "Do you want the same thing to happen to you?" Harris understood this to mean "Get back, don't get involved" or "Get, scoot, scat. Don't get in the way. Don't get involved. Leave. Don't make me shoot you."

As appellant got in his truck and started to leave, Harris threw a beer bottle breaking the truck's rear window. Almost immediately after the window was broken, appellant fired three shots in rapid sequence. One of the shots passed within 18 inches of Harris and struck a nearby vehicle. Harris then hid as appellant slowly pulled out of the parking lot, apparently looking for Harris.

Appellant was stopped and arrested by Chula Vista police officers. The officers noted the truck smelled of gunpowder and found a .45 caliber semi-automatic pistol inside the cab. The weapon's hammer was back and the safety was off. A shell casing was found on the driver's side floorboard and the rear window was shattered and broken glass was found in the vehicle. Appellant was arrested and charged with multiple crimes arising from the shooting.

Lopez's head wound resulted in life-threatening injuries and permanent brain damage. It was stipulated that at the time of his arrest appellant had a blood alcohol level of .20. It was further stipulated bullets recovered from the nightclub wall and Lopez's head were fired from the pistol found in appellant's truck.

B. *Defense Case*

Appellant's uncle and spouse testified appellant was not a violent person and had a reputation for nonviolence. Appellant's spouse testified appellant was drunk when he left the family home on the night of the shooting.

J. Raymond Wells, a neurologist, testified that at the time of the shooting appellant's blood alcohol content was between .21 and .22 percent and at that level an individual's decision making process is severely impaired.

DISCUSSION

A. *Sufficiency of the Evidence*

Appellant argues the evidence was insufficient to convict him of dissuading/intimidating a witness under section 136.1 and of attempted voluntary manslaughter. The standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *(Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781].) Substantial evidence must be reasonable, credible and of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139.)

1. Dissuading or Intimidating a Witness

Appellant contends the evidence is insufficient to sustain his conviction of intimidation/dissuading of a witness under section 136.1. A broadly written law, section 136.1 proscribes a wide range of conduct falling under the general rubric of preventing or dissuading a witness or victim from testifying or doing other acts.

In particular, section 136.1, subdivision (c)(1), makes it unlawful to knowingly and maliciously use force, or implied threats of force or violence, in attempting to prevent or dissuade a victim or witness from doing any of the acts described in subdivisions (a) or (b) of that section, which includes "every person who attempts to prevent or dissuade another person . . . who is a witness to a crime from" (§ 136.1, subd. (b)), among others, "[a]rresting or causing or seeking the arrest of any person in connection with that victimization" (§ 136.1, subd. (b)(3).

After discussion with counsel and without objection, the court instructed the jury with CALJIC No. 7.15 that a conviction required proof: "one, Roger Harris was a witness or victim; two, the defendant, with specific intent prevent or dissuade Roger Harris from arresting or causing or seeking the arrest of any person in connection with such victimization; three, that the defendant acted knowingly and maliciously; and four, that the act of preventing, dissuading or the attempt thereto was accompanied by force or by an express or implied threat of force or violence upon the person of another or property of the witness or victim or any third person." The jury found appellant guilty of the crime.

In assessing whether section 136.1 is violated, there is no requirement the defendant use specific words in confronting the victim. (See *People v. Thomas* (1978) 83 Cal.App.3d 511, 514; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1342-1345.) For example, a defendant is properly convicted as long as words or actions support the inference the defendant attempted by threat of force to induce a person to withhold testimony. (*People v. Thomas, supra,* 83 Cal.App.3d at p. 514.) While *Thomas* and *Mendoza* applied section 136.1 to testifying witnesses, the same rationale reasonably applies to sufficient acts which amount to a violation where the victim is seeking to arrest or facilitate arrest. In fact, section 136.1 may be committed whether or not a witness testifies. (*People v. Dollar* (1991) 228 Cal.App.3d 1335, 1342.) The proper test, in the case of a both testifying witness, as well as a victim who might cause or seek arrest as did Harris, is identical. That test here is whether the defendant's acts or actions support the inference he intended to attempt to dissuade or intimidate by an express or implied threat of force.

With respect to intent, the determination whether a defendant intended his words to be taken as a threat and whether the words were sufficiently unequivocal, unconditional, immediate and specific, they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. (See *People v. Mendoza, supra,* 59 Cal.App.4th at p. 1340.)

While Harris is clearly a victim and witness under the circumstances, the closer question is whether appellant had the specific intent to prevent or dissuade Harris from

arresting, or causing or seeking his arrest. Shortly after the shooting, in the parking lot after appellant entered his pickup, Harris confronted appellant. The verbal exchange between appellant and Harris suggests an intent by appellant to prevent arrest. Harris told appellant he should wait at that location. Appellant responded with a question: "Do you want the same thing to happen to you?" Appellant's words conveyed a clear threat to Harris who understood them to mean that he should not get involved. The words unequivocally showed appellant was threatening Harris with some kind of reprisal had Harris persisted. (*People v. Jones* (1998) 67 Cal.App.4th 724, 727.)

Furthermore, in determining appellant's intent, his words are considered in context. That is, under all the circumstances, did appellant intend to threaten or intimidate Harris in order to prevent or dissuade him from causing or seeking appellant's arrest? The facts suggest a reasonable trier of fact could find appellant did intend to do precisely that. Appellant pointed his pistol at Harris's head as he queried whether he wished to meet the same fate as Lopez. As appellant began to drive away, Harris threw the beer bottle that broke the rear window of appellant's truck. Seconds later, appellant fired three shots, one of which apparently missed Harris by only 18 inches. The brandishing of the weapon, shattered glass and shot fired provide concrete contextual meaning for the arguably vague verbal exchange. A reasonable conclusion could be that appellant was seeking to intimidate and dissuade Harris from causing his arrest.

We find under these circumstances a jury, therefore, could reasonably conclude appellant harbored the specific intent to intimidate or dissuade Harris from causing or seeking his arrest.

2. Attempted Voluntary Manslaughter

Appellant contends the evidence was insufficient to convict him of the attempted voluntary manslaughter of Harris. Appellant states it appears the jury concluded he did not *intend* to kill either Lopez or Harris and found him guilty of voluntary manslaughter on a sudden quarrel or heat of passion theory. Appellant contends that while the evidence was sufficient to find a quarrel or heat of passion with regard to the shooting of Lopez, there was no such evidence with regard to the assault on Harris.

We first sort out appellant's argument. Here the jury was instructed that attempted murder requires malice aforethought. Malice aforethought was defined as the intent to kill. The jury was told that attempted voluntary manslaughter is committed when, while the defendant intended to kill, the killing occurred upon a sudden quarrel or heat of passion or when there is an actual but unreasonable belief in the necessity to defend oneself against imminent peril.

Contrary to appellant's position, in light of these instructions, the jury necessarily found that he intended to kill Harris. There is certainly sufficient evidence to support that finding. Appellant's contends, however, there was insufficient evidence of a quarrel or sudden heat of passion or, though unmentioned by appellant, insufficient evidence of imperfect self-defense. Thus, appellant essentially contends while the jury necessarily found he intended to kill Harris, i.e., there was malice aforethought, it erred in finding any basis for reducing the required finding of murder to voluntary manslaughter and thus, appellant should have been found not guilty of any attempted criminal homicide as to Harris.

The argument lacks merit. In *People v. Rios* (2000) 23 Cal.4th 450, the court dealt with the relationship of murder and voluntary manslaughter. There as here the defendant was convicted of voluntary manslaughter. He complained on appeal that the instructions on voluntary manslaughter was prejudicially incomplete in that it lacked mention of the "elements" of provocation or imperfect self-defense. The court characterized this as an argument that "if the jury believed he committed an intentional, unlawful killing, without provocation or belief in the need to defend himself, it must acquit him of voluntary manslaughter." (*Id*. at p. 454.)

In response, the court stated: "[A] conviction of voluntary manslaughter is supported by proof and findings . . . that the homicide was unlawful and intentional. There is no additional need for the prosecution to establish that malice was lacking by reason of provocation or a belief in the need for self-defense." (*People v. Rios, supra,* 23 Cal.4th at p. 454.)

The court explained: "If the issue of provocation or imperfect self-defense is . . . 'properly presented' in a murder case [citation.], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. [Citations.] California's standard jury instructions have long so provided. [Citation.] In such cases, if the fact finder determines the killing was intentional and unlawful, but is not persuaded beyond reasonable doubt that provocation (or imperfect self-defense) was absent, it should acquit the defendant of murder and convict him of voluntary manslaughter. [Citations.]

"Provocation and imperfect self-defense therefore cannot be elements of voluntary manslaughter when murder and voluntary manslaughter are under joint consideration. Were it otherwise, the prosecution would face irreconcilable requirements, where provocation or imperfect self-defense was at issue, to obtain an appropriate conviction. On the one hand, the People would have to prove, beyond reasonable doubt, the *absence* of these factors in order to establish the greater offense, but on the other hand, would have to prove their *presence* beyond reasonable doubt to establish the lesser one. A fact finder doubtful that provocation or imperfect self-defense was lacking, but also not persuaded beyond reasonable doubt that either was present, could convict the defendant of *neither* murder *nor* voluntary manslaughter, even though it found the defendant had killed intentionally, without justification or excuse. Such a result would turn the law of criminal homicide on its head." (*People v. Rios, supra*, 23 Cal.4th at p. 462, fn. omitted.)

The evidence was sufficient to establish appellant attempted to intentionally and unlawfully kill Harris. He was properly convicted, therefore, of attempted voluntary manslaughter.

B. *Lesser Included Offenses*

Appellant contends the court committed reversible error in failing to instruct the jury on the offense of section 246.3, grossly negligent discharge of a firearm. Although not entirely clear, it appears appellant argues the court erred as to all offenses involving Harris and all those alleging assault with a firearm or discharge of a firearm from an automobile.

1. Background

Counsel for appellant requested the trial court to instruct the jury with CALJIC No. 9.03.3, grossly negligent discharge of a firearm, which requires each of the following elements be proved: "(1) A person willfully [and unlawfully] discharged a firearm; [¶] (2) The person who discharged the firearm did so in a grossly negligent manner; and [¶] (3) The discharge of the firearm was done in a manner which could result in injury or death to a person."

The trial court rejected counsel's contention that negligent discharge of a firearm is a lesser included offense as to any of the charges. Counsel for appellant then requested the instruction be given as a lesser-related offense. The prosecution objected and the court denied the request. Appellant now contends the instruction was proper as to all offenses involving Harris and also those charges involving assault with a semi-automatic firearm or discharge of a firearm from a motor vehicle.

2. Law

Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) Lesser included instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "'substantial enough to merit consideration'" by the jury. (*People v. Breverman* (1998) Cal.4th 142, 162.) The obligation to instruct on a lesser included offense exists *sua sponte* and should be given,

when warranted, even over a defendant's objection. (*Ibid*.) However, a misdirection of the jury as to a lesser included offense in a noncapital case is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. *(Id.* at p. 165.)

For purposes of defining lesser included offenses, "use" enhancements are not considered part of the accusatory pleading test. (*People v. Wolcott* (1983) 34 Cal.3d. 92, 100-101.) Therefore, enhancements charged against appellant are excluded from consideration.

3. Discussion

a. Murder

Discharge of a firearm under section 246.3 is not a lesser included offense of attempted murder. Clearly, murder may be committed without necessarily also committing the negligent discharge of a firearm.

b. Assault With A Semi-Automatic Firearm

Assault with a semi-automatic firearm as charged under section 245, subdivision (b), requires (1) a person was assaulted and (2) the assault was committed with a semi-automatic firearm. (§ 245, subd. (b); CALJIC No. 9.02.1.) An assault may be committed by simply presenting a gun at a person who is within range. (*People v. Colantuono* (1994) 7 Cal.4th 206, 219.) Negligent discharge of a firearm is not necessarily committed in every case of assault with a firearm because the assault can be completed without firing a shot. Therefore, the trial court properly found section 246.3 is not a lesser included charge of 245, subdivision (b).

c. Discharge Of A Firearm From a Motor Vehicle

The elements of the crime of discharging a firearm from a vehicle are (1) willful and malicious discharge of a firearm, (2) from a vehicle, (3) at a person and (4) other than an occupant of the vehicle. (§ 12034, subd. (c).)

The elements of the crime of discharging a firearm in a grossly negligently manner that could result in injury are (1) willful discharge of a firearm, (2) in a grossly negligent manner and (3) which could result in the injury of death of a person. (§ 246.3.)

Since it is possible to commit a violation of section 12034, subdivision (c), without being grossly negligent, i.e., the discharge of a firearm at a person can be done intentionally, section 246.3 is not a lesser included offense.

In any event any error in failing to give an instruction of section 246.3 was harmless. Assuming the trial court did fail to instruct as to this lesser included offense, there is no basis to establish a reasonable probability the alleged mistake affected the outcome. Such an error is not subject to reversal unless an examination of the entire record establishes a reasonable probability the error affected the outcome. (*People v. Breverman, supra*, 19 Cal.4th at p. 165.) Here, the jury convicted appellant of attempted voluntary manslaughter of Harris. That conviction was based on appellant shooting at Harris and further required the jury to conclude appellant harbored the intent to kill Harris. It is unlikely the same jury would have concluded appellant simultaneously attempted voluntary manslaughter but did so only with gross negligence as required under section 246.3. We therefore find no reasonable probability the outcome would have been different had the section 246.3 instruction been given.

3. Lesser Related Offenses

A criminal defendant has no unilateral entitlement to instructions on lesser-related offenses that are not necessarily included in the charge. (*People v. Birks, supra*, 19 Cal.4th at p. 136.) *Birks* further holds lesser-related instructions cannot be given over a prosecutor's objection. (*Ibid.)* Here, appellant requested instructions as the lesser-related offense under section 246.3, the prosecution objected and the court refused the instruction. We find, under *Birks*, the court made the proper ruling and therefore committed no error.

C. *Ineffective Assistance of Counsel*

Appellant argues the trial court erred in denying his motion for new trial based on the claim of ineffective assistance of counsel. Relying on his own declaration attached to the motion for new trial, appellant claimed that before trial he stated to counsel his desire to testify that the shooting of Lopez was an accident. Counsel ignored this request and proceeded with a defense of intoxication. Appellant argues there was no valid tactical basis for rejecting the complete defense of accident and not allowing appellant to testify and the trial court erred in denying the motion for new trial.

1. Background

In a declaration attached to his motion for new trial, appellant stated he repeatedly told counsel that the shooting of Lopez was accidental. Counsel replied that intoxication was a better defense. Counsel at first agreed to call appellant to testify and stated he would prepare him for such testimony before trial. Counsel did not prepare appellant.

On the first day of trial, counsel stated he was the professional and that appellant should not interfere with the presentation of the intoxication defense. Appellant did not testify.

In his motion, appellant argued he had an absolute right to testify. He stated that counsel had no authority to deny him that right and that to do so was ineffective assistance of counsel. Appellant argued such act was ineffective assistance since no competent attorney would deny a defendant his right to testify and argued such ineffective assistance was prejudicial since it removed a complete defense to the charges related to Lopez.

No declaration from trial counsel was attached to the motion.

The trial court denied appellant's motion for new trial.

2. Law

A criminal defendant is entitled to the effective assistance of counsel. It is the defendant's burden to demonstrate the inadequacy of trial counsel. A defendant must show both that the assistance given was deficient, that is, it fell below an objective standard of reasonableness under prevailing professional norms, and that it was prejudicial. Prejudice exists when it is reasonably probable that but for such deficient assistance the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. We defer to counsel's reasonable tactical decisions and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Defendant's burden is difficult to carry on direct appeal. We reverse on the ground of inadequate assistance on appeal only if the record affirmatively discloses no rational

tactical purpose for counsel's act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Moreover, when "'the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.'" [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 871.)

3. Discussion

Our reading of appellant's argument on appeal indicates he has changed his position from that presented below. In his motion, appellant argued counsel's act of denying him his constitutional right to testify was itself ineffective assistance and was prejudicial since it resulted in the failure to present a viable defense. On appeal he makes the more conventional argument that there was no tactical reason for not using a defense of accident. He argues the only means of presenting that defense was appellant's testimony and the failure to present that defense was prejudicial since it was reasonably probably had the defense been presented a more favorable result for appellant would have been achieved.

Appellant's argument below relied totally on his claim that he repeatedly requested to testify and counsel refused to call him. Appellant's self-serving declaration was an insufficient evidentiary device for raising that claim and his motion for new trial could properly be denied on that basis. (*Underwood v. Clark* (7th Cir. 1991) 939 F.2d 473, 476; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 937.)

Appellant's claim that counsel was ineffective for failing to offer a defense of accident also fails. There are myriad tactical considerations that effect the decision to present or not present a particular defense. There are numerous reasons why counsel might decide not to present a defense of accident especially when it would require the defendant to testify. Appeal is simply not, in most cases, a useful device for exploring such questions. Appellant has failed his burden of demonstrating ineffective assistance.

The judgment is affirmed.

BENKE, J.

WE CONCUR:

KREMER, P. J.

HALLER, J.